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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

DOCKET FILED JUN 24 1998

In the Matter of

Applications of WorldCom, Inc. and
MCI Communications Corporation for
Transfer of Control of
MCI Communications Corporation to
WorldCom, Inc.

CC Docket No. 97-211

RECEIVED

JUN 24 1998

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

To: The Commission

**GTE'S RESPONSE TO JOINT OPPOSITION TO DISCLOSURE OF STAMPED
CONFIDENTIAL DOCUMENTS**

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Dated: June 24, 1998

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FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of

Applications of WorldCom, Inc. and
MCI Communications Corporation for
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**GTE'S RESPONSE TO JOINT OPPOSITION TO DISCLOSURE OF STAMPED
CONFIDENTIAL DOCUMENTS**

GTE Service Corporation, its affiliated telecommunications companies,¹ and GTE Internetworking (collectively "GTE"), by their attorneys, hereby submit their Response to the Joint Objection of WorldCom, Inc. and MCI Communications Corporation to Disclosure of Stamped Confidential Documents. On April 21, 1998, the Common Carrier Bureau required that WorldCom and MCI submit information concerning their proposed merger to the Commission.² WorldCom and MCI filed a proposed protective

¹ GTE Alaska, Incorporated, GTE Arkansas Incorporated, GTE California Incorporated, GTE Florida Incorporated, GTE Hawaiian Telephone Company Incorporated, The Micronesian Telecommunications Corporation, GTE Midwest Incorporated, GTE North Incorporated, GTE Northwest Incorporated, GTE South Incorporated, GTE Southwest Incorporated, Contel of Minnesota, Inc., Contel of the South, Inc., GTE Communications Corporation, and GTE Hawaiian Tel International Incorporated.

² Letter from Carol E. Matthey, Division Chief, Policy and Planning Division, FCC to Andrew D. Lipman, Swidler & Berlin, Counsel for WorldCom, and Anthony C. Epstein, Jenner & Block, Counsel for MCI (Apr. 21, 1998).

order on April 27, 1998.³ The Bureau adopted a modified *Protective Order* on June 5, 1998.⁴

Under the *Protective Order*, the Commission permitted review of “Stamped Confidential Documents” (“Documents”) by: (1) “outside counsel of record,” and (2) “in-house counsel who are actively engaged in the conduct of this proceeding, provided that those in-house counsel seeking access are not involved in competitive decision-making.” Additionally, the Commission allowed these parties to disclose the Documents to, among others, (1) “the partners, [and] associates . . . of such counsel to the extent reasonably necessary to render professional services in this proceeding;”⁵ and (2) “outside consultants or experts retained for the purpose of assisting counsel in these proceedings and who are not involved in the analysis underlying the business decisions and who do not participate directly in the business decisions of any competitor of any Submitting Party.”⁶ The Commission also established procedures for eligible persons to gain access to the Documents, including requiring that “each person seeking . . . access shall execute the Acknowledgment of Confidentiality . . . and provide a copy of the executed Acknowledgment of Confidentiality to the Commission and to each Submitting Party so that it is received by each Submitting Party five

³ See *Order Adopting Protective Order*, CC Docket No. 97-211, at 1 (June 5, 1998).

⁴ See *Protective Order*, attached as Appendix A to *Order Adopting Protective Order*, CC Docket No. 97-211 (June 5, 1998) (“Protective Order”).

⁵ *Protective Order* at 1-2.

⁶ *Protective Order* at 2.

business days prior to such person's reviewing or having access to any such Stamped Confidential Documents."⁷

On June 12, 1998, GTE submitted a Notification of Document Review to the Commission and to the Submitting Parties in accordance with these requirements.⁸ This document notified the Commission and the Submitting Parties that a group of attorneys and support staff meeting the Protective Order's requirements intended to review the Documents. WorldCom and MCI filed a Joint Objection To Disclosure of Stamped Confidential Documents on June 17, 1998 objecting to disclosure of documents to Scott Flick, James Olson, and Mark Schechter of Howrey & Simon, and Steven G. Bradbury and John Frantz of Kirkland & Ellis, on the grounds that these attorneys were not "counsel of record" to GTE.⁹ Additionally, WorldCom and MCI challenged disclosure to Richard W. Stimson and C. Daniel Ward of GTE on the grounds that "these senior level in-house counsel are actively engaged in 'competitive decision-making' for GTE."¹⁰ In this filing, GTE addresses the challenged disclosure to Scott Flick, James Olson, and Mark Schechter of Howrey & Simon, and Steven G. Bradbury and John Frantz of Kirkland & Ellis. Because WorldCom's and MCI's legal arguments are faulty and their factual claims are incorrect, the Commission should

⁷ Protective Order at 2.

⁸ Notification of Document Review of GTE, CC Docket No. 97-211 (June 12, 1998).

⁹ Joint Objection of WorldCom, Inc. and MCI Communications Corporation To Disclosure of Stamped Confidential Documents, CC Docket No. 97-211, at 1-2 (June 17, 1998) ("Joint Objection").

¹⁰ Joint Objection at 2.

promptly deny the Joint Objection and allow GTE to conduct its review of the Documents in accordance with the Protective Order.

GTE will address the challenged disclosure to Richard W. Stimson and C. Daniel Ward of GTE in a later filing and hereby reserves its right to do so.

I. ATTORNEYS FROM HOWREY & SIMON AND KIRKLAND & ELLIS ARE ELIGIBLE TO REVIEW THE STAMPED CONFIDENTIAL DOCUMENTS BECAUSE THEY ARE COUNSEL OF RECORD, PARTNERS OR ASSOCIATES OF COUNSEL OF RECORD, OR OUTSIDE CONSULTANTS.

A. Messrs. Bradbury, Flick, and Schechter Are Counsel of Record for GTE.

The *Protective Order* states that “Stamped Confidential Documents may be reviewed by outside counsel of record.”¹¹ WorldCom and MCI base their Joint Objection on the claim that “counsel of record are the attorneys representing a party before the FCC that sign petitions, motions, pleadings, briefs, and other documents filed by any party represented by counsel,” and that “[c]ounsel of record do not include attorneys who are not identified as counsel on such documents.”¹² This understanding of “counsel of record” is unsupported by Commission rules and precedent and at odds with the common legal definition of the phrase.

¹¹ *Protective Order* at 1.

¹² Joint Objection at 2.

Black's Law Dictionary defines "counsel of record" as an "[a]ttorney whose appearance has been filed with court papers."¹³ Similarly, the Second Circuit has stated that to be an "attorney of record" one must "have appeared for the client by participating in a legal proceeding on the client's behalf *or* by having his [or her] name affixed to the pleadings, motions, records, briefs, or other papers submitted in the matter."¹⁴ Because the Commission has not adopted an interpretation of "counsel of record" that narrows this generally accepted definition, any attorney "whose appearance has been filed" with the Commission or who has appeared on behalf of a client in a proceeding before the Commission is a "counsel of record" on GTE's behalf and, thus, entitled to review the Documents under the Protective Order.

Steven G. Bradbury, Scott Flick, and Mark Schechter have appeared before the Commission on behalf of GTE on several occasions in *ex parte* meetings with staff concerning the merger of WorldCom and MCI. GTE has recorded these appearances in three *Ex Parte* Communication letters: (1) a June 5, 1998 letter to the Commission indicating that "Steven Bradbury of Kirkland & Ellis" appeared before the Commission to "discuss the effects of MCI's proposal to divest limited aspects of its Internet business" on behalf of GTE;¹⁵ (2) an April 22, 1998 letter to the Commission indicating that "Mark

¹³ *Black's Law Dictionary*, sixth ed., at 348 (West Publishing Co., 1990).

¹⁴ *ITAR-TASS Russian News Agency et al., v. Russian Kurier, Inc.*, 140 F.3d 442 (2d. Cir. 1998) (*quoting Cataldo v. Budget Rent A Car Corp.*, 226 A.D.2d 574, 574, 641 N.Y.S.2d 122, 122 (NY 2d. Dept. 1996)) (emphasis added).

¹⁵ Letter to Magalie Roman Salas from R. Michael Senkowski, Re: *Ex Parte* Communication Applications of WorldCom, Inc. and MCI Communications Corporation for Transfer of Control of MCI to WorldCom (CC Docket No. 97-211) (June 5, 1998)
(Continued...)

Schechter (Howrey & Simon)" appeared before the Commission "on behalf of GTE;"¹⁶ and (3) a March 23, 1998 letter to the Commission indicating that "Mark Schechter and Scott Flick, of Howrey & Simon" appeared before the Commission "to review the arguments set forth by GTE in its March 13, 1998 Comments on the WorldCom/MCI Joint Reply."¹⁷ Because these letters provide irrefutable evidence that Messrs. Bradbury, Flick, and Schechter are "counsel of record" for GTE in this proceeding, the Commission should promptly order that WorldCom and MCI allow these attorneys to review the Documents.

In contrast, the Applicants' alleged support for their interpretation of "counsel of record," which they claim excludes the Howrey & Simon and Kirkland & Ellis attorneys, is simply not apposite. Commission Rule 1.52, cited by WorldCom and MCI, does not define "counsel of record" as only those attorneys who sign Commission documents. The rule states that "[t]he original of all petitions, motions, pleadings, briefs, and other documents filed by any party represented by counsel shall be signed by at least one attorney of record."¹⁸ Rule 1.52 thus merely requires that all documents be signed by "at least one attorney of record;" it does not state that *only* those attorneys that sign

(...Continued)
(attached as Appendix 1).

¹⁶ Letter to Magalie Roman Salas from R. Michael Senkowski, Re: CC Docket No. 97-211 (April 22, 1998) (attached as Appendix 2).

¹⁷ Letter to Magalie Roman Salas from R. Michael Senkowski, Re: Applications of WorldCom, Inc. and MCI Communications Corporation for Transfer of Control of MCI to WorldCom (CC Docket No. 97-211) (Mar. 23, 1998) (attached as Appendix 3).

¹⁸ 47 C.F.R. § 1.52.

documents are “attorneys of record.” To assert otherwise is, at best, a gross misunderstanding of the rule.

WorldCom’s and MCI’s references to U.S. Supreme Court Rule 9 and *Leventhal v. New Valley Corp.* are similarly misleading.¹⁹ The U.S. Supreme Court, unlike the Commission, requires parties to designate only one attorney as the “counsel of record.” Parties designate this attorney by placing his or her “name, address, and telephone number . . . on the cover of a document presenting for filing.”²⁰ Because the Commission does not require parties to choose only one “counsel of record,” this rule is inapplicable. Furthermore, neither the U.S. Supreme Court nor any other federal court has ruled that as a general matter only attorneys who sign court documents are “counsel of record.”

The *Leventhal v. New Valley* decision is not to the contrary. Although WorldCom and MCI cite *Leventhal* for the proposition that “[c]ounsel of record do not include attorneys who are not identified as counsel on [pleadings or other] documents,”²¹ they have misread the case. The *Leventhal* court stated that “Rule 11 liability may be visited upon an ‘attorney of record’ who signs a ‘pleading, motion, [or] other paper’” The finding that Rule 11 liability may attach to an “attorney of record” that also signs a court document does not mean that only attorneys that sign court documents are “attorneys of record.” The court’s holding that an attorney who signs an affidavit as a witness is

¹⁹ Joint Objection at 2.

²⁰ U.S. Sup. Ct. Rule 9.

²¹ Joint Objection at 2.

not an attorney of record and thus subject to Rule 11 sanctions is, therefore, limited and inapplicable to this proceeding.²²

B. Messrs. Bradbury, Flick, Schechter, Frantz and Olson Are “Partners” or “Associates” of “Counsel of Record” or “Outside Consultants” Who Are Eligible To Review the Stamped Confidential Documents.

The Protective Order did not limit review of the Stamped Confidential Documents to counsel of record and eligible in-house counsel. The Commission allowed these attorneys to disclose the Documents to “the partners, [and] associates . . . of such counsel to the extent reasonably necessary to render professional services in this proceeding.”²³

Mr. Frantz is an associate of Mr. Bradbury at Kirkland & Ellis. Mr. Olson is a partner of Messrs. Flick and Schechter at Howrey & Simon. Both of these attorneys have been involved in GTE’s analysis of the WorldCom/MCI merger, and their assistance is necessary to allow Messrs. Bradbury, Flick, and Schechter “to render professional services in this proceeding.”²⁴ As such, “[s]ubject to paragraph 5 and subject to the obligation to secure the confidentiality of Stamped Confidential

²² The individual in *Leventhal* who the court determined was not a counsel of record was not even acting as an attorney in the proceeding *sub judice*. He had appeared only as a “an affiant-witness, who happened to be an attorney.” *Leventhal*, 148 F.R.D. at 112.

²³ Protective Order at 1-2.

²⁴ Protective Order at 2.

Documents in accordance with the terms of [the] order,"²⁵ Messrs. Franz and Olson are eligible to review the Documents.

If the Commission determines that Messrs. Bradbury, Flick, and Schechter are not "counsel of record," all of the Howrey & Simon and Kirkland & Ellis attorneys are still eligible to review the Documents under the Protective Order. The Commission should, in that case, consider them "outside consultants or experts retained for the purpose of assisting counsel in these proceedings."²⁶ Because the Howrey & Simon and Kirkland & Ellis attorneys have assisted Wiley, Rein & Fielding and GTE throughout this proceeding, even acting as counsel of record themselves, and because they "are not involved in the analysis underlying the business decisions and . . . do not participate directly in the business decisions of any competitor of any Submitting Party,"²⁷ the Commission should order that Messrs. Bradbury, Flick, Schechter, Olson, and Frantz are eligible to review the Documents.

II. CONCLUSION

For the foregoing reasons, Scott Flick, James Olson, and Mark Schechter of Howrey & Simon, and Steven G. Bradbury and John Frantz of Kirkland & Ellis are entitled to review the Documents. As such, GTE respectfully requests that the

²⁵ Protective Order at 1.

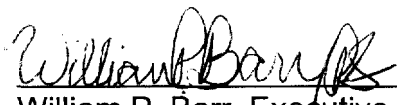
²⁶ Protective Order at 2.

²⁷ Protective Order at 2.

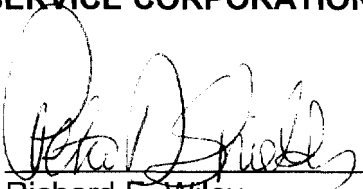
Commission order that Messrs. Bradbury, Flick, Schechter, Olson, and Frantz are eligible to review such Documents.

Respectfully submitted,

GTE SERVICE CORPORATION

By: 
William P. Barr, Executive Vice
President & General Counsel
and
Ward W. Wueste, Vice President -
Deputy General Counsel

GTE SERVICE CORPORATION
One Stamford Forum
Stamford, CT 06904

By: 
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June 24, 1998

APPENDIX 1

DUPLICATE

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R MICHAEL SENKOWSKI
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June 5, 1998

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Magalie Roman Salas
Secretary
Federal Communications Commission
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Washington, D.C. 20554

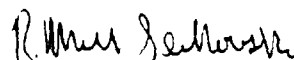
Re: Ex Parte Communication
Applications of WorldCom, Inc. and MCI Communications Corporation
for Transfer of Control of MCI to WorldCom (CC Docket No. 97-211)

Dear Ms. Salas:

On June 4, 1998, John T. Curran and Alan Ciamporzero, of GTE Service Corporation ("GTE"), Steven Bradbury of Kirkland & Ellis, and I met with Commission staff members from the Common Carrier Bureau, listed below, to discuss the effects of MCI's proposal to divest limited aspects of its Internet business. We also addressed the concerns raised in GTE's prior pleadings about the anti-competitive effects that the proposed merger will have on the Internet backbone market.

In accordance with Section 1.1206(b) of the Commission rules, 47 C.F.R. § 1.1206(b), an original and one copy of this notice are being submitted to the Secretary.

Sincerely,



R. Michael Senkowski

cc: Common Carrier Bureau:
Michelle Carey
Eric Bash
Michael Kende
Dan Stockdale

APPENDIX 2

DUPLICATE

WILEY, REIN & FIELDING

1776 K STREET, N.W.
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R. MICHAEL SENKOWSKI
(202) 429-7249

April 22, 1998

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APR 22 1998

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Ms. Magalie R. Salas
Secretary
Federal Communications Commission
1919 M Street, N.W.
Room 222
Washington, D.C. 20554

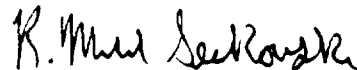
Re: CC Docket No. 97-211

Dear Ms. Salas:

In accordance with Section 1.1206 (a) (2) of the Commission's Rules, 47 C.F.R. § 1.1206 (a) (2) (1991), this is to notify the Commission that on April 22, 1998, Whitney Hatch (GTE), Mark Schechter (Howrey & Simon), Robert Harris (Law & Economics Consulting Group, Inc.), and I on behalf of GTE met with Bill Bailey, John Berresford, Michelle Carey, Michael Kende, and Marilyn Simon. The purpose of this meeting was for Mr. Harris to review the long distance-related issues raised by the proposed MCI WorldCom merger, as discussed in his Affidavit, filed as Appendix 3 to GTE's Comments of March 13, 1998.

If you have any questions, please do not hesitate to contact me.

Respectfully submitted,



R. Michael Senkowski

RMS:daj

cc: William Bailey
John Berresford
Michelle Carey
Michael Kende
Marilyn Simon

APPENDIX 3

DUPLICATE

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March 23, 1998

MAR 23 1998

FEDERAL COMMUNICATIONS COMMISSION
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(202) 429-7049

Magalie Roman Salas
Secretary
Federal Communications Commission
1919 M St., N.W. Room 222
Washington, D.C. 20554

**Re: Applications of WorldCom, Inc. and MCI Communications Corporation for
Transfer of Control of MCI to WorldCom (CC Docket No. 97-211)**

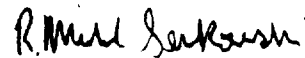
Dear Ms. Salas:

On March 20, 1998, F. Whitney Hatch and Scott Marcus, of GTE Service Corporation ("GTE"), Marc Schechter and Scott Flick, of Howery & Simon, and I met with Commission staff members from the Common Carrier Bureau, the International Bureau, the Office of Plans and Policy, and the Office of the General Counsel's Competition Division, listed below, to review the arguments set forth by GTE in its March 13, 1998 Comments on the WorldCom/MCI Joint Reply. In addition, we discussed the following topics related to Internet services: (1) how the shortest exit routing works; (2) GTE's general policies regarding Internet peering agreements; (3) how multi-homing works; (4) the differences between Internet service providers and Internet backbone providers; and (5) the entry barriers to the Internet backbone provider market.

Magalie Roman Salas
March 23, 1998
Page 2

In accordance with Section 1.1206(b) of the Commission rules, 47 C.F.R. § 1.1206(b), an original and one copy of this notice are being submitted to the Secretary.

Sincerely,



R. Michael Senkowski

cc: Michelle Carey, Eric Bash, Michael Pryor, William Bailey and Michael Kende
Policy and Program Planning Division, Common Carrier Bureau
James D. Earl, Sondrine Betoule and Matthew Nagler
Competition Division, Office of General Counsel
Stan Trost, Patrick DeGraba and Mike Nelson
Office of Plans and Policy
Helen Domenici
International Bureau

CERTIFICATE OF SERVICE

I hereby certify that on this 24th day of June, 1998, I caused copies of the foregoing "GTE's Response to Joint Opposition to Disclosure of Stamped Confidential Documents" to be delivered by hand to the following:

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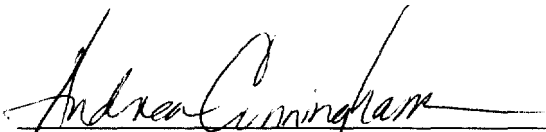
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